

# Michigan Journal of Gender & Law

---

Volume 21 | Issue 2

---

2014

## A Joyful Heart Is Good Medicine: Sexuality Conversion Bans in the Courts

Wyatt Fore  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjgl>



Part of the [Civil Rights and Discrimination Commons](#), [Juvenile Law Commons](#), [Sexuality and the Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Wyatt Fore, *A Joyful Heart Is Good Medicine: Sexuality Conversion Bans in the Courts*, 21 MICH. J. GENDER & L. 311 (2014).

Available at: <https://repository.law.umich.edu/mjgl/vol21/iss2/3>

<https://doi.org/10.36641/mjgl.21.2.joyful>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

A JOYFUL HEART IS GOOD MEDICINE:  
SEXUALITY CONVERSION BANS IN THE COURTS

*Wyatt Fore\**

ABSTRACT

*Led by California and New Jersey, states have begun to ban Sexual Orientation Change Efforts (SOCE) for minors. States have targeted SOCE, also called ‘gay conversion therapy,’ by regulating state licensure requirements for mental health professionals. Conservative legal groups have challenged these bans in federal court, alleging a variety of constitutional violations sounding in the First and Fourteenth Amendments. More specifically, these legal groups propose theories claiming that the bans infringe upon individuals’ freedom of speech, free exercise, and parental rights. In this Note, I survey the history of these bans, as well as court decisions that have rejected constitutional challenges to the laws. This Note then proposes and rejects another potential theory challenging the bans under the Due Process Clause’s right to privacy. Finally, this Note proposes that this new wave of state legislation reflects a wider shift in the LGBT community’s priorities, tactics, and messages.*

ABSTRACT • 311

INTRODUCTION • 312

- I. HOW AND WHY DO STATES BAN SOCE? • 313
  - A. *What are SOCE?* • 313
  - B. *How and Why Do States Attempt to Ban SOCE for Minors?* • 315
  - C. *Current Status of Constitutional Challenges to the SOCE Bans* • 316
- II. FIRST AMENDMENT CLAIMS • 318
  - A. *Freedom of Speech Claims* • 318
  - B. *Plaintiffs’ Other First Amendment Claims* • 321
  - C. *Outer Boundaries of First Amendment Analysis* • 323

---

\* J.D. Candidate, 2015, University of Michigan Law School; B.A., 2008, University of Virginia. I am grateful to Professor Ed Goldman, Karalena Guerrieri, Emily Suran, Shay Elbaum, Sami Hall, Kate Meier-Davis, Kevin Potter, and Freya Riedlin for their many helpful comments and edits to this Note.

- III. SUBSTANTIVE DUE PROCESS CLAIMS: PARENTAL RIGHTS • 325
  - A. *Articulations of the Parental Rights Claim* • 325
  - B. *Courts' Analyses of Plaintiffs' Substantive Due Process Claims* • 326
  - C. *Outer Boundaries of Parental Rights Claims* • 328
- IV. SUBSTANTIVE DUE PROCESS CLAIMS: PRIVACY AND SEXUALITY: A POTENTIAL CLAIM FOR SOCE BAN OPPONENTS • 329
- V. PROJECTING FORWARD: WHAT DO SOCE BANS MEAN FOR THE LGBT MOVEMENT? • 332
  - A. *"Disgust" to "Dignity"* • 334
  - B. *SOCE Bans as an Organizational Tool* • 338
- CONCLUSION • 339

#### INTRODUCTION

In 2012, California made headlines by becoming the first state to legislate that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”<sup>1</sup> Perhaps recognizing the significant change in public policy this bill would entail, the California assembly carefully tailored the bill to address opponents’ concerns by, for example, removing an informed consent requirement on conversion therapy for adults.<sup>2</sup> In addition, the bill did not prevent conversion therapists from announcing their opinions on sexual orientation, but rather banned a particular treatment, and only for minors. Following California’s lead, New Jersey Gov. Chris Christie signed a similar ban into law in August 2013.<sup>3</sup>

Socially conservative legal groups led opposition to the California law by suing in the United States District Court for the Eastern District of California. The complaints allege three theories of constitutional violation:

- 
1. S. 1172, 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865 (Westlaw through Ch. 531 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2nd Ex. Sess., and all propositions on 2014 ballots)).
  2. See S. COMM. ON BUS., PROFESSIONS AND ECON. DEV., HEALING ARTS: SEXUAL ORIENTATION CHANGE EFFORTS, SB 1172 (Cal. 2012), *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1151-1200/sb\\_1172\\_cfa\\_20120419\\_155807\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1172_cfa_20120419_155807_sen_comm.html).
  3. Kate Zernike, *Christie Signs Gay ‘Conversion Therapy’ Ban*, N.Y. TIMES, Aug. 19, 2013, at A14.

Freedom of Speech, Free Exercise of Religion, and the “fundamental right to direct the upbringing of one’s child.”<sup>4</sup> At the core of these complaints lie alleged injuries to three sorts of rights: (1) the right of the minor to take steps to curtail unwanted romantic attractions; (2) the right of the therapist to provide appropriate mental health therapies according to his or her conscience; and (3) the right of the minor’s parents or guardians to provide adequate and appropriate medical and spiritual care in accordance with their faith.

This Note surveys the legal challenges brought against bans on Sexual Orientation Change Efforts (“SOCE”), as well as the history that led to the SOCE bans. In Part I, this Note examines why the California and New Jersey legislatures decided to ban SOCE for minors, as well as the regulatory structures they used to accomplish that goal. Parts II and III of this Note analyze the legal claims that opponents of SOCE bans alleged, starting with First Amendment claims and then moving on to the substantive due process claims.<sup>5</sup> Finally, Parts IV and V of this Note anticipate possible challenges to SOCE bans that plaintiffs have not yet alleged and articulate how the movement for SOCE bans fits into the wider LGBT movement’s agenda.

## I. HOW AND WHY DO STATES BAN SOCE?

### A. *What are SOCE?*

The American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation defines SOCE as:

[M]ethods that aim to change a same-sex sexual orientation (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) to heterosexual, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved.<sup>6</sup>

SOCE have historically consisted of a wide variety of therapeutic approaches, ranging from behavioral (electroshock therapy, satiation therapy,

---

4. Complaint at 2, *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EF (E.D. Cal. Oct. 4, 2012), 2012 WL 5981507.

5. The California cases, *Pickup v. Brown* and *Welch v. Brown*, also contained void-for-vagueness claims, which are not discussed in this Note.

6. AM. PSYCHOLOGICAL ASS’N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE: APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 12 n.5 (2009) [hereinafter APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION].

orgasmic reconditioning, etc.), to cognitive (attempting to change thought patterns, redirecting thoughts, hypnosis, etc.), and educational (instruction in dating skills, affection training, etc.).<sup>7</sup> However, “following the removal of homosexuality from the DSM<sup>8</sup> . . . [b]ehavior therapists became increasingly concerned that aversive therapies designed as SOCE for homosexuality were inappropriate, unethical, and inhumane.”<sup>9</sup> The law responded to this shift in psychological standards of care. One court noted that “aversion techniques . . . have not been used by any ethical and licensed mental health professional in decades.”<sup>10</sup>

Since the passage of California’s law in 2012, several states have either banned SOCE for minors or taken significant steps towards banning SOCE for minors. As of November 2014, such bans are law in New Jersey and California, and legislators have proposed similar bills in Pennsylvania, Ohio, New York, Illinois, Washington, Virginia, Maryland, Minnesota, Florida, Hawaii, Massachusetts, Rhode Island, Vermont, Wisconsin, Michigan, and the District of Columbia.<sup>11</sup> Regardless of the state, the bills propose a ban on SOCE for minors in a similar way: they focus on already regulated conduct by “a person who performs counseling as part of the person’s professional training for any of these professions [professional licensed mental health counselors].”<sup>12</sup> Accordingly, the bills would not cover, for example,

---

7. *Id.* at 22.

8. The Diagnostic and Statistical Manual of Mental Disorders (“DSM”) is a commonly used handbook of standard criteria for classifying mental disorders published by the American Psychiatric Association. The DSM is currently in its fifth edition. See *DSM*, AM. PSYCHIATRIC ASS’N (2014), <http://www.psychiatry.org/practice/dsm>.

9. APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, *supra* note 6, at 24.

10. *King v. Christie*, 981 F. Supp. 2d 296, 315 n.16 (D.N.J. 2013).

11. 11Assemb. 3371, 215th Leg., Reg. Sess. (N.J. 2012) (codified at 2013 N.J. Sess. Law Serv. § 45:1-54 - 1-55) (Westlaw through L.2014, c. 60 and J.R. No. 3); S. 1172, 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865); S. 872, 2013-14 Leg., Reg. Sess. (Pa. 2013); S. 188, 130th Gen. Assemb., Reg. Sess. (Ohio 2013); S. 4869, 236th Leg., Reg. Sess. (N.Y. 2013); S. 3575, 98th Gen. Assemb., Reg. Sess. (Ill. 2014); H.R. 2451, 63rd Leg., Reg. Sess. (Wash. 2014); H.D. 1135, 2014 Leg., Reg. Sess. (Va. 2014); H.D. 91, 434th Gen. Assemb., Reg. Sess. (Md. 2014) (withdrawn); H.R. 1906, 88th Leg., Reg. Sess. (Minn. 2014); H.B. 221, 2013-14 Leg., Reg. Sess. (Fla. 2014) (failed to pass in Health Innovation Subcomm., May 02, 2014) (companion S. 240 failed to pass in Health Policy, May 02, 2014); S. 2204, 27th Leg., Reg. Sess. (Haw. 2014) (companion H. 1789); H.R. 3907, 188th Leg., Reg. Sess. (Mass. 2014); S. 2510, 2014 Gen. Assemb., Reg. Sess. (R.I. 2014); H.R. 755, 2013-14 Gen. Assemb., Reg. Sess. (Vt. 2014); S. 481, 2013-14 Leg., Reg. Sess. (Wis. 2014) (failed to pass pursuant to S.J. Res. 1, 2013-14 Leg., 101 Reg. Sess. (2014)); H.R. 5703, 97th Leg., Reg. Sess. (Mich. 2014); Council 501, 20th Period (D.C. 2013).

12. Assemb. 3371 § (2)(a), 215th Leg., Reg. Sess. (N.J. 2012) (codified at 2013 N.J. Sess. Law Serv. § 45:1-55(a) (Westlaw through L.2014, c. 60 and J.R. No. 3).

unlicensed counseling from a spiritual leader. Across states, however, the legislative language differs slightly in terms of the scope of minors protected. Whereas California's law bars change efforts only on the basis of sexual orientation,<sup>13</sup> New Jersey's law,<sup>14</sup> as well as the proposed bans in several other states, covers sexual orientation as well as gender identity.<sup>15</sup> Lastly, the legislative language of SOCE bans, enacted or not, does not explicitly prohibit affirmative therapies, which California has defined as those that "provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and . . . do not seek to change sexual orientation."<sup>16</sup>

### *B. How and Why Do States Attempt to Ban SOCE for Minors?*

States that have enacted these bans recognize that SOCE harm the mental health of minors.<sup>17</sup> Accordingly, these states use their broad police powers to regulate public health in order to protect minors from this psychological harm.<sup>18</sup> States' broad police powers, as well as their powerful role in licensing mental health professionals, mean that they are in a unique

- 
13. S. 1172 § 2(b)(1), 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865). Although SB 1172 does not explicitly prevent nonaffirming therapy for transgender youth, it does bar "efforts to change behaviors or gender expressions," § 2 (b)(1). Further, the Act states that "California has a compelling interest in protecting . . . transgender youth." § 1(n). Moreover, SB 1172 notes that the American Psychoanalytic Association has found that "[p]sychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's . . . gender identity or gender expression." § 1(j). As a result, it is unclear what the full effect SB 1172 has on nonaffirming therapy for transgender youth.
  14. Assemb. 3371, 215th Leg., Reg. Sess. (N.J. 2012) (codified at 2013 N.J. Sess. Law Serv. § 45:1-54 - 1-55).
  15. Attempts to change an individual's gender identity do not include affirming transition therapy that provide support as an individual changes his/her outward gender presentation or biological sex to conform with inner conceptions of his/her gender identity. *See, e.g.*, S. 4869, 236th Leg., Reg. Sess. (N.Y. 2013) ("The term [SOCE] does not include counseling for an individual seeking to transition from one gender to another . . .").
  16. S. 1172 § 2(b)(1), 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865).
  17. For example, the California Legislature has asserted that it has, "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." § 1(n).
  18. *See, e.g.*, 39A C.J.S. *Health & Environment* § 1 (2014) ("Protection of the public health is a primary duty of government since there is no public policy more important than the protection of citizens from practices which may injure their health.").

position within the federal system to address this sort of psychological harm. California and New Jersey use this power to enforce SOCE bans via licensure and professional regulations, which fall within a state's ability to regulate the medical profession.<sup>19</sup> Although legislatures typically give great deference to medical professionals to establish standards of care, states heavily regulate the licensure requirements for mental health professionals, such as family therapists, social workers, and school psychologists.<sup>20</sup>

A public policy commitment to de-stigmatizing LGBT youth also motivates legislatures to enact anti-SOCE measures.<sup>21</sup> Legislators give great weight to reports and statements from well-respected scientific and professional associations that show the harmful effects of these stigmatization efforts, and they cite those materials in the text of the bills themselves.<sup>22</sup> For example, the co-sponsor of the Pennsylvania bill alluded to this motivation in a press release, emphasizing that SOCE serve little purpose other than tormenting at-risk youth: “[t]his is not science; it’s science fiction. This is not about treatment; it’s about punishment.”<sup>23</sup>

### C. Current Status of Constitutional Challenges to the SOCE Bans

After California passed its SOCE ban for minors in 2012, opponents of the ban challenged the law in two different actions. The first, *Welch v. Brown*,<sup>24</sup> was filed on October 1, 2012, in the Eastern District of California. The plaintiffs were current and future licensed mental health professionals; they were represented by the Pacific Justice Institute, a Sacramento-based legal defense organization that specializes in the “defense of religious free-

---

19. See, e.g., Brief for Appellant at 27, *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). (“[W]here speech is ‘part of the practice of medicine,’ it is ‘subject to reasonable licensing and regulation by the State.’”).

20. See, e.g., N.J. REV. STAT. § 45: 1-1 - 16A (establishing New Jersey’s power to regulate certain professions and providing examples).

21. See, e.g., S. 1172 § 1(a), 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865) (“Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming.”).

22. See *id.* § 1(a) (“The major professional associations of mental health practitioners and researchers in the United States have recognized this fact [that LGB identity is not a disease or disorder] for nearly 40 years.”).

23. J. Rudy Flesher, *Watch: Rep. Brian Sims to Introduce Ban on Reparative Therapy in Pennsylvania*, NEW CIV. RTS. MOVEMENT (Sept. 18, 2013), <http://www.thenewcivilrightsmovement.com/watch-rep-brian-sims-to-move-ban-on-reparative-therapy-in-pa/legislation/2013/09/18/75296>.

24. Complaint, *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. Oct. 1, 2012) (No. 2:12-cv-02484-WBS-KJN).

dom, parental rights, and other civil liberties.”<sup>25</sup> District Judge William Shubb granted the plaintiffs’ request for a preliminary injunction on December 3, 2012.<sup>26</sup>

The second action, *Pickup v. Brown*,<sup>27</sup> was filed on October 4, 2012, also in the Eastern District of California. The plaintiffs in *Pickup* were undisclosed minors seeking SOCE, their parents, licensed mental health professionals, the National Association for Research and Therapy of Homosexuality (“NARTH”), and the American Association of Christian Counselors (“AACC”). On December 4, 2012, Judge Kimberly Mueller denied the plaintiffs’ motion for preliminary injunction.<sup>28</sup> Given the similar subject matter, *Pickup* was combined with *Welch* on appeal before the Ninth Circuit. On August 29, 2013, a three-judge panel for the Ninth Circuit reversed the preliminary injunction granted in *Welch*, affirmed the *Pickup* denial of preliminary injunction, and remanded the cases for further proceedings.<sup>29</sup> As a result, California’s ban on SOCE for minors is currently good law.

In New Jersey, Governor Chris Christie signed into law a similar ban on SOCE for minors on August 19, 2013. Just three days later, *King v. Christie* challenged the ban in federal court.<sup>30</sup> The plaintiffs in *King* were licensed mental health professionals, NARTH, and the AACC, and were represented by Demetrios Stratis, an attorney in private practice in New Jersey. On November 8, 2013, Judge Freda L. Wolfson granted the defendant’s motion for summary judgment.<sup>31</sup> The plaintiffs appealed the judgment to the Third Circuit, which upheld the conversion ban in a unanimous opinion in September 2014.<sup>32</sup>

---

25. *About Us*, PAC. JUST. INST., <http://www.pacificjustice.org/about-us.html> (last visited Oct. 2, 2014).

26. Order Granting Plaintiff’s Motion for Preliminary Injunction, *Welch*, 907 F. Supp. 2d 1102 (No. 2:12-cv-02484-WBS-KJN).

27. See Complaint, *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EF (E.D. Cal. Oct. 4, 2012), 2012 WL 5981507.

28. See Order Denying Plaintiff’s Motion for Preliminary Injunction, *Pickup*, No. 2:12-CV-02497-KJM-EF (E.D. Cal. Dec. 4, 2012).

29. *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

30. See Complaint, *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013) (No. 3:13-cv-05038-FLW-LHG).

31. See Complaint, *King*, 981 F. Supp. 2d 296 (No. 3:13-cv-05038-FLW-LHG).

32. *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). The opinion uses a similar analysis as the 9th Circuit in *Pickup*, finding that therapist-patient communication constitutes conduct, and does not violate the First Amendment.

## II. FIRST AMENDMENT CLAIMS

In all three lawsuits, the plaintiffs opposing the SOCE bans bring several claims under the First Amendment, including the freedoms of speech and religion.<sup>33</sup> Additionally, the plaintiffs claim that three general parties are injured: the minor patients, the minors' parents, and professionals providing SOCE.<sup>34</sup> In their SOCE opinions the federal courts focused heavily on the freedom of speech claims, analyzing whether therapy using exclusively speech ("talk therapy") constitutes professional conduct or protected speech. The plaintiffs also raised secondary First Amendment claims surrounding freedom of association and religious liberty, but courts quickly dismissed these claims, focusing their analysis instead on freedom of speech.<sup>35</sup>

### A. Freedom of Speech Claims

Central to all the SOCE plaintiffs' First Amendment claims is a literal interpretation of "free speech" because many SOCE techniques involve "talk therapy," a conversational style of therapy that involves a patient talking aloud about his or her issues with a therapist who intervenes to offer suggestions and reframing.<sup>36</sup> This type of therapy aims to overcome a minor patient's unwanted feelings by discussing aloud his or her issues relating to sexual orientation or gender identity.<sup>37</sup> Opponents of the SOCE ban allege that it violates the freedom of speech of both the counselor and the minor patient. With respect to the counselor, the plaintiffs reason that the counselor has a protected right as a professional both to announce a preference for therapy in line with his or her religious and moral convictions as well as to provide that therapy through constitutionally protected speech with consenting patients.<sup>38</sup> For the minor patient, the plaintiffs allege that the patient has a protected right to talk through his or her concerns about sexual orientation.

---

33. See generally Complaint, *King*, 981 F. Supp. 2d 296 (No. 3:13-cv-05038-FLW-LHG); Complaint, *Pickup*, No. 2:12-CV-02497-KJM-EF, 2012 WL 5981507; Complaint, *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. Dec. 3, 2012) (No. 2:12-cv-02484-WBS-KJN).

34. Complaint, *King*, 981 F. Supp. 2d 296 (No. 3:13-cv-05038-FLW-LHG); Complaint, *Pickup*, No. 2:12-CV-02497-KJM-EF, 2012 WL 5981507; Complaint, *Welch*, 907 F. Supp. 2d 1102 (No. 2:12-cv-02484-WBS-KJN).

35. See, e.g., *Pickup*, 728 F.3d at 1058 ("[W]e conclude that the freedom of association also does not encompass the therapist-client relationship.").

36. See, e.g., Complaint at 19, *King*, 981 F. Supp. 2d 296 (No. 3:13-cv-05038-FLW-LHG).

37. Mike Airhart, *John Paulk: Proud to Be Ex Ex Gay*, EX-GAY WATCH (May 3, 2014), <http://www.exgaywatch.com/2014/05/john-paulk-proud-to-be-ex-ex-gay/>.

38. Counselors claim that it would be unethical for them to try to impose their own personal viewpoint on an unwilling client. *King*, 981 F. Supp. 2d at 322 n.24.

Central to this argument is a plain reading of the First Amendment, on which some commentators urge that “one-on-one advice and counseling be protected as free speech.”<sup>39</sup> As a result, the New Jersey District Court stated, “[t]he threshold issue before the Court is whether A3371 [the New Jersey bill banning SOCE] regulates constitutionally protected speech.”<sup>40</sup> Importantly, although both California and New Jersey’s bills banned all forms of SOCE, the plaintiffs’ claims in both cases focus exclusively on “talk therapy,” and do not contest the constitutionality of bans on other forms of SOCE.<sup>41</sup>

In analyzing the *Pickup* plaintiffs’ free speech claim, the Ninth Circuit determined that talk therapy in the California SOCE ban is “a regulation of professional conduct.”<sup>42</sup> In making this determination, the court relied on the plain language of the statute, which defines the covered therapeutic practices narrowly: “Senate Bill 1172 defines SOCE as ‘any practices by mental health providers that seek to change an individual’s sexual orientation . . . .’”<sup>43</sup> Further, violating the ban results only in professional reprimands, reflecting the statute’s core purpose of targeting conduct which would be outside the bounds of acceptable licensed conduct. The court also drew a distinction between speech that constitutes professional conduct, such as SOCE, and non-professional speech, like expressing an opinion on same-sex attractions or a referral to a non-licensed religious leader.<sup>44</sup>

Both the New Jersey and California courts found that such regulation occurs in all sorts of professions, and that the First Amendment primarily protects speech in the context of public debate. For example, “[a] lawyer may be disciplined for divulging confidences of his client, even though such disclosure is pure speech.”<sup>45</sup> The reasoning behind this fairly obvious point relied on the underlying assumptions around the First Amendment that “[w]hen professionals by means of their state-issued licenses, form relation-

---

39. Paul Sherman & Robert McNamara, *Protecting the Speech We Hate*, N.Y. TIMES (Oct. 9, 2013), [http://www.nytimes.com/2013/10/10/opinion/protecting-the-speech-we-hate.html?\\_r=1&](http://www.nytimes.com/2013/10/10/opinion/protecting-the-speech-we-hate.html?_r=1&).

40. *King*, 981 F. Supp. 2d at 312.

41. In fact, the plaintiffs in *King v. Christie* argue that “the parade of horrors derived from aversion techniques, such as electroshock treatments . . . have not been used by any ethical and licensed mental health professionals in decades, and . . . mental health professionals who engage in such practices should have their licenses revoked.” Complaint at 18, *King*, 981 F. Supp. 2d 296 (No. 3:13-cv-05038-FLW-LHG).

42. *Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013).

43. *Pickup*, 728 F.3d at 1049 (citations omitted).

44. *See Pickup*, 728 F.3d at 1049-50. *But see* Wollschlaeger v. Farmer, 814 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011) (holding a Florida statute which barred physicians from inquiring about patients’ gun ownership to be unconstitutional violation of *physicians’* free speech).

45. *Pickup*, 728 F.3d at 1055.

ships with clients, the purpose of those relationships is to advance the welfare of the clients rather than contribute to public debate.”<sup>46</sup> As a result, the Ninth Circuit found that “the communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation.”<sup>47</sup> The Ninth Circuit added that the ban does not regulate the expression of personal opinions about the moral appropriateness of SOCE, making the law content and viewpoint neutral, a very important conclusion for the court’s constitutional analysis: “Even if the licensing scheme [for mental health professionals] . . . [is] regulated speech, it did not trigger strict scrutiny because it was both content neutral and viewpoint neutral.”<sup>48</sup>

The Ninth Circuit consequently proceeded with a rational-basis review of the free speech claim. A variety of legal standards can govern free speech claims, depending on the context. In public dialogue about public concerns, speech receives the strongest protection; mid-level protection is given to professional speech within a professional relationship; and the least protection is afforded to regulation of professional *conduct* where that regulation has only an “incidental effect on speech.”<sup>49</sup> The Ninth Circuit applied the lowest standard, because the court held that SB 1172 “bans a form of medical treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients.” As a result, the First Amendment “does not prevent a state from regulating treatment even when that treatment is performed through speech alone.”<sup>50</sup> The ban “regulates only treatment while leaving mental health providers free to discuss and recommend, or recommend against, SOCE,” and as a result any effects on free speech are inherently incidental.<sup>51</sup>

The Ninth Circuit found, under rational basis scrutiny, that the legislature rationally could have determined that SOCE for minors was a public health risk because it relied on qualified scientific determinations, such as the American Psychological Association’s Task Force on Appropriate Therapeutic Responses to Sexual Orientation and a wide variety of professional groups of mental health providers and counselors.<sup>52</sup> In particular, the legis-

---

46. *Pickup*, 728 F.3d at 1055 (citations omitted).

47. *Pickup*, 728 F.3d at 1052 (citations omitted). Although *Welch v. Brown* found that fundamental speech rights were violated, implicating strict scrutiny, the decision was overturned by the Ninth Circuit. 907 F. Supp. 2d 1102, 320–26 (E.D. Cal. 2012). The Ninth Circuit found that no fundamental speech right was violated, and used a rational basis inquiry.

48. *Pickup*, 728 F.3d at 1052.

49. *Pickup*, 728 F.3d at 1055.

50. *Pickup*, 728 F.3d at 1055–56.

51. *Pickup*, 728 F.3d at 1056.

52. See S. 1172 § 1, 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865) (the American Psychological Association’s Task Force on Appro-

lature acted rationally in balancing the “overwhelming” amount of evidence against SOCE versus “some evidence that SOCE is safe and effective.”<sup>53</sup> Therefore, the court had “no trouble concluding that the legislature acted rationally by relying on that consensus [against SOCE].”<sup>54</sup>

The Ninth Circuit was careful to describe the ways that a similar law might have violated the First Amendment, even though the current law had not.<sup>55</sup> For example, although the law prohibits the talk therapy that constitutes most SOCE, the law does not prohibit communication between the therapist and minor regarding the appropriateness of SOCE, or even referrals to SOCE providers in other states: “Here, unlike in *Conant* [wherein a district court struck down a federal law banning doctors from recommending marijuana as treatment], the law *allows* discussion about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.”<sup>56</sup> Thus, the court found, the purpose of the statute is to regulate conduct, and does not dip into the more difficult territory of regulating viewpoints or the content of speech.<sup>57</sup> As a result the court “need not decide whether SOCE actually causes ‘serious harms’; it is enough that it could be ‘reasonably be conceived to be true by the governmental decisionmaker.’”<sup>58</sup> The New Jersey court agreed that SOCE bans address conduct, and not speech.<sup>59</sup>

### B. Plaintiffs’ Other First Amendment Claims

Although the *King* plaintiffs (but not the California plaintiffs) argued that the religious beliefs of counselors providing SOCE were substantially burdened “because [the SOCE ban] prohibits them from providing spiritual

---

appropriate Therapeutic Responses to Sexual Orientation concluded that “[s]exual orientation change efforts (SOCE) pose critical health risks to lesbian, gay, and bisexual people”); *see also* Assemb. 3371 § 1(d), 215th Leg., Reg. Sess. (N.J. 2012) (codified at 2013 N.J. Sess. Law Serv. § 45:1–54) (“The American Psychiatric Association published a position statement in March of 2000 in which it stated: ‘Psychotherapeutic modalities to convert or “repair” homosexuality are based on developmental theories whose scientific validity is questionable.’”).

53. *Pickup*, 728 F.3d at 1057.

54. *Pickup*, 728 F.3d at 1057.

55. *Pickup*, 728 F.3d at 1057.

56. *Pickup*, 728 F.3d at 1056 (citation omitted); *see also* *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (holding that regulation preventing government funds from being used to discuss abortion does not violate providers’ First Amendment rights because it merely requires the separation of abortion discussion from government-funded project).

57. *Pickup*, 728 F.3d at 1050.

58. *Pickup*, 728 F.3d at 1050.

59. *See King v. Christie*, 981 F. Supp. 2d 296, 320 (D.N.J. 2013).

counsel and assistance on the subject matter of same-sex relationships,”<sup>60</sup> the New Jersey court dismissed these claims.<sup>61</sup> The *King* court determined that the proper standard of analysis was whether the law is “neutral and of general applicability, [and thus] it need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice.”<sup>62</sup> Addressing this standard, the court found that the government action in this case is neutral because the SOCE ban satisfies the standard that “a law is neutral if it does not target religiously motivated conduct on its face or as applied in practice.”<sup>63</sup>

The court further explained that the New Jersey SOCE ban “on its face . . . is neutral,” because it “makes no reference to any religious practice, conduct, or motivation.”<sup>64</sup> The plaintiffs disagreed, asserting that there is a lack of neutrality with regard to therapy because the statute exempts affirmative therapies, such as therapies that allow the minor patient to explore his or her sexual identity and therapies that facilitate a gender transition. The court quickly dismissed this argument stating, “there can be no serious doubt that the Legislature enacted [the ban] because it found that SOCE ‘poses critical health risks’ to minors.”<sup>65</sup> Further, the tailoring of the law, which is aimed at regulating the medical conduct of licensed professionals, does not attempt to “suppress, target, or single out the practice of any religion because of religious conduct.”<sup>66</sup> As a result, the court found that the ban does not sweep too far into protected religious rights.

Lastly, the *King* plaintiffs claimed that the freedom of association between the minor and his or her therapist had been compromised.<sup>67</sup> However, this claim was quickly dismissed, as “SB 1172 does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships,” and further “the therapist-client relationship is not the type of relationship that the freedom of association has been held to protect.”<sup>68</sup>

---

60. *King*, 921 F. Supp. 2d at 331. Notably, the Ninth Circuit’s analysis in *Pickup* does not address free exercise claims.

61. The *King* court also dismissed the plaintiffs’ free-speech claims, using a similar analysis as the Ninth Circuit. *King*, 921 F. Supp. 2d at 330.

62. *King*, 921 F. Supp. 2d at 331 (quoting *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)) (internal citations omitted).

63. *King*, 921 F. Supp. 2d at 331 (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410 (E.D. Pa. 2012)).

64. *King*, 921 F. Supp. 2d at 331.

65. *King*, 921 F. Supp. 2d at 332 (quoting Assemb. 3371, 215th Leg., Reg. Sess. (N.J. 2012) (codified at 2013 N.J. Sess. Law Serv. § 45:1-54)).

66. *King*, 921 F. Supp. 2d at 332.

67. Complaint at 43, *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EF (E.D. Cal. Oct. 4, 2012), 2012 WL 5981507.

68. *Pickup v. Brown*, 728 F.3d 1042, 1058 (9th Cir. 2012).

### C. Outer Boundaries of First Amendment Analysis

Although the Ninth Circuit has held that California's authority to regulate mental health counselors includes barring them from providing harmful care, it has implied that a less carefully tailored law might implicate greater scrutiny.<sup>69</sup> The New Jersey plaintiffs in *King* questioned the tailoring of the New Jersey ban, arguing that the court should apply intermediate scrutiny as enunciated in *United States v. O'Brien*, because the law burdens expression but is content neutral.<sup>70</sup> However, under *O'Brien*, a "sufficiently important government interest in regulating" the nonspeech element of a course of conduct that includes both speech and nonspeech elements "can justify incidental limitations on First Amendment freedoms."<sup>71</sup> The *King* court drew on language from the Ninth Circuit in *Pickup*, noting that if the SOCE ban has an effect on speech then "it is no more than incidental."<sup>72</sup> Therefore, in order for the bans on SOCE for minors to trigger tougher scrutiny, the laws would have to impact speech directly by, for example, prohibiting all statements by therapists on the subject of SOCE.

Moreover, the form of the legislation itself targets therapists via licensure requirements,<sup>73</sup> and it does not sweep broadly into protected expressive conduct.<sup>74</sup> The law does not prohibit SOCE during *all* mental health counseling, such as counseling by a spiritual leader or via informal therapy.<sup>75</sup> The New Jersey court held that this narrow tailoring was evidence that the bill regulates professional conduct and does not implicate wider opinions of the role of LGBT people in society.<sup>76</sup> However, ban opponents alleged illicit motives, claiming that California is actually attempting to suppress opinions

---

69. *Pickup*, 728 F.3d at 1055.

70. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

71. *O'Brien*, 391 U.S. at 376.

72. *King v. Christie*, 921 F. Supp. 2d 296, 321 n.21 (D.N.J. 2013).

73. Some have argued that the therapist-client relationship is inherently commercial, and thus a commercial speech approach should be taken. See, e.g., Shawn L. Fultz, Comment, *If It Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of Central Hudson*, 65 AM. U. L. REV. 567 (2013). However, the commercial speech standard is a significantly lower one than ordinary First Amendment claims, and as a result is not discussed in this Note.

74. See *King*, 921 F. Supp. 2d at 326.

75. Perhaps tort claims may arise, using California's public policy as evidence of a breach of professional duty. However, that is outside the scope of the legislation and this Note.

76. See *King*, 921 F. Supp. 2d at 326.

that counter public policy,<sup>77</sup> but courts generally do not examine deeply a statute's purpose if a rational basis can be theoretically construed.<sup>78</sup>

Because laws that impact speech directly are more likely to infringe upon the First Amendment, the New Jersey court first determined whether the legislation intended to regulate speech or conduct. The court distinguished the two by stating that:

To be clear, the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct.<sup>79</sup>

As a result, the tension lies in whether the legislature is banning SOCE as expressive conduct (more like speech), or if it is a more mainstream scientific regulation of public health. Here, the court concluded that the purpose of the legislation was the latter. However, if legislatures veered closer to the regulation of expressive conduct of mental health therapists by, for example forbidding them from discussing SOCE, these laws would become more problematic. Indeed, courts have struck down analogous restrictions of the doctor-patient relationship in medicinal marijuana,<sup>80</sup> abortion,<sup>81</sup> and physician-assisted suicide cases.<sup>82</sup>

---

77. See, e.g., News Release, Parents and Friends of Ex-Gays and Gays, US Supreme Court Asked to Strike Calif. Ban on Sexual Orientation Change Efforts (Mar. 19, 2014) ("This law [California SOCE ban] is trying to advance a socio-political agenda . . ."), available at <http://www.pfox.org/us-supreme-court-asked-to-strike-calif-ban-on-sexual-orientation-change-efforts/>.

78. *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). *But see* *Welch v. Brown*, 907 F. Supp. 2d 1102, 1117–18 (E.D. Cal. 2012) (holding that SB 1172 lacks content and viewpoint neutrality, and therefore is likely unconstitutional under the First Amendment), *rev'd*, *Pickup v. Brown*, 728 F.3d 1042, 1061–62 (9th Cir. 2012).

79. *King*, 981 F. Supp. 2d at 319.

80. *Conant v. Walters*, 309 F.3d 629, 638–39 (9th Cir. 2002) (holding that the federal government could not prohibit California doctors from recommending marijuana for medical purposes under California's medicinal marijuana law).

81. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F. Supp. 2d 972 (D.S.D. 2009) (holding that South Dakota's law mandating abortion providers to advise that there is a link between abortion and depression did not violate the First Amendment, because the court defers to a legislature to determine what studies are reliable), *rev'd*, 686 F.3d 889, 906 (8th Cir. 2012) (en banc).

82. See, e.g., *Final Exit Network, Inc. v. State*, 290 Ga. 508, 510–11 (2012) (holding that Georgia cannot prohibit the advertising of physician-assisted suicides).

### III. SUBSTANTIVE DUE PROCESS CLAIMS: PARENTAL RIGHTS

#### A. *Articulations of the Parental Rights Claim*

The plaintiffs' complaints also allege injury to another party—parents whose minor children wish to undergo SOCE. Federal courts generally have given great deference to parental interests in supervising and directing the upbringing of their children. For example, in the abortion context, a unanimous Supreme Court found that “[s]tates unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their strong and legitimate interest in the welfare of their young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”<sup>83</sup> This protection of parental rights in the abortion context indicates that a more basic interest is at issue: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>84</sup> This parental right to guide the upbringing of their children generally is protected against the unreasonable uses of power of the government: “[L]iberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”<sup>85</sup> However, this parental right parallels the natural duties parents have toward their children, to protect their health and guide their education: “[C]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.”<sup>86</sup>

Although controversial, courts have even found that parents have the power to sterilize their developmentally disabled children who would not be able to consent to such a procedure for themselves.<sup>87</sup>

---

83. *Ayotte v. Planned Parenthood of No. New England*, 546 U.S. 320, 326 (2006) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990)) (internal citations omitted).

84. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

85. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

86. *Meyer*, 262 U.S. at 400.

87. *In re Lora Faye Wirsing*, 573 N.W.2d 51, 55 (Mich. 1998) (“[T]he ward is unable to choose for herself whether she wishes to become pregnant. To deprive her of the option of sterilization, in addition to affronting the statute, would make the choice for her, and make the same choice for each ward, regardless of circumstances.”). Although the court here is using a “substituted-judgment” analysis because the ward is not able to make an informed decision on her own behalf, the irreplaceable position of the parents, who instituted the action on their daughter’s behalf, implicates a strong degree of state deference to the parents’ decision-making.

However, parental freedoms do not trump all state action, and regulation by the state is particularly salient in the public health context, where the safety or health of the child or other community members is at risk. Indeed, the Supreme Court has stated that “neither the rights of religion nor rights of parenthood are beyond limitation,” and this right to religion “does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>88</sup> In line with the special interest the states have in the health of their youths, the Eastern District of California found in *Welch* that the “state has a *compelling interest* in protecting the physical and psychological well-being of minors.”<sup>89</sup>

SOCE ban opponents in *Welch* and *Pickup* challenged the SOCE bans under substantive due process theories primarily based on this view of parental rights. However, the *Welch* plaintiffs’ complaints also alleged that “[t]he right to privacy recognizes that government has limited authority to restrict the ability of citizens to access information and services related to their personal autonomy, identity, and sexuality.”<sup>90</sup> Although the constitutional right to privacy famously has been utilized in the sexual and reproductive rights context to expand the legality of contraception,<sup>91</sup> abortion,<sup>92</sup> and intimate conduct,<sup>93</sup> plaintiffs’ complaints notably do not cite *Lawrence*, *Baird*, *Roe*, or *Casey*,<sup>94</sup> presumably so as to not give credence to precedent with which they disagree.

### B. Courts’ Analyses of Plaintiffs’ Substantive Due Process Claims

In both the California and New Jersey cases, parental rights claims received only cursory, if any, consideration. The courts generally found the plaintiffs’ free speech claims to be more compelling. For example, the Ninth Circuit Court of Appeals focused primarily on First Amendment claims, and then only secondarily on parental rights.<sup>95</sup> When it did discuss parental rights, the court articulated the limitations of these parental rights, finding

88. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

89. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1118 (E.D. Cal. 2012) (emphasis added) (citation omitted), *rev’d*, *Pickup v. Brown*, 728 F.3d 1042, 1061–62 (9th Cir. 2013).

90. Complaint at 67, *Welch*, 907 F. Supp. 2d 1102 (No. 2:12-cv-02484-WBS-KJN) .

91. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

92. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

93. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

94. *See infra* Part IV.

95. *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). As a rudimentary sample, the Circuit panel spends approximately five pages discussing First Amendment protections of freedom of speech and expressive association and merely one and a half pages discussing substantive due process protections of parental rights. A further one and a half pages discuss void-for-vagueness and overbreadth claims.

that “the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.”<sup>96</sup> Similarly, in *Welch v. Brown*,<sup>97</sup> Judge William B. Shubb devoted his analysis exclusively to the contours of free speech jurisprudence, rarely mentioning parental rights at all. Rather, the opinion focused on First Amendment concerns, such as the rights of children to be exposed to different ideas and the state’s restriction of viewpoints. Lastly, Judge Freda Wolfson in *King v. Christie* entirely omitted the issue of parental rights, focusing her opinion solely on First Amendment claims of free speech and free exercise—perhaps because those claims were more at the crux of the alleged constitutional injury.<sup>98</sup>

In contrast, Judge Kimberly J. Mueller in the Eastern District of California focused her opinion in *Pickup v. Brown* much more heavily on substantive due process protections,<sup>99</sup> and she addressed both privacy and parental rights concerns. However, her privacy analysis largely ends with holding both that there is “no constitutional right of access to particular medical treatments reasonably prohibited by the government”<sup>100</sup> and that “California’s governmental interest in protecting public health, deriving from its police power, enables it to prohibit certain treatments without infringing on plaintiffs’ fundamental privacy rights.”<sup>101</sup> Additionally, the opinion utilized the traditional parental rights analysis in *Prince* and *Meyer*, holding that “[the] fundamental parental interest . . . is not without limitation . . . The state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.”<sup>102</sup> The court concluded that these parental rights are limited because “states have a compelling interest in safeguarding the physical and psychological well-being of a minor.”<sup>103</sup>

---

96. *Pickup*, 728 F.3d at 1061.

97. *Welch*, 907 F. Supp. 2d 1102 (E.D. Cal. Oct. 1, 2012).

98. *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013).

99. See *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 U.S. Dist. LEXIS 172034 (E.D. Cal. 2013), *aff’d*, 728 F.3d at 1061–62.

100. *Pickup*, 2012 U.S. Dist. LEXIS 172034, at \*35 (citing with approval *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.D.C. 2007)).

101. *Pickup*, 2012 U.S. Dist. LEXIS 172034, at \*79–80.

102. *Pickup*, 2012 U.S. Dist. LEXIS 172034, at \*59.

103. *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*59–60 (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982) (internal citations omitted)).

### C. Outer Boundaries of Parental Rights Claims

As a baseline, courts give high deference to parental decision-making.<sup>104</sup> However, as discussed previously, this deference has limitations when a state finds potential harm to the minor or threats to public safety.<sup>105</sup> This boundary to parental rights reflects the strong entrenchment of general police powers to regulate issues regarding public health and safety: “The preservation of the public health is one of the duties devolving on the state as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important.”<sup>106</sup> Therefore, this protection of the minors’ psychological health trumps protected parental rights.

Legislation regarding public health generally receives broad judicial deference unless it infringes on constitutional rights. As a result, legislative findings that SOCE harm minors reinforce that regulations barring SOCE meet legal standards that the legislation be “grounded in the methods and procedures of science,”<sup>107</sup> and consequently the legislature is not targeting a medical practice as a proxy for impermissible aims.

Because legislation may not contravene constitutional rights, the tailoring of the law plays a significant role in its constitutionality. For example, in the District Court’s analysis of *Pickup*, the court defines the right at issue as the right to select a “specific mental health treatment that the state has deemed harmful to minors,”<sup>108</sup> and not the plaintiffs’ asserted right of par-

---

104. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (“[T]here will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decision concerning the rearing of that parent’s children.”); *Reno v. Flores*, 507 U.S. 292, 304 (1993) (“[S]o long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interest of the parents or guardians themselves.”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of the parents, as contrasted with that of the State, to guide the religious future and education of their children.”).

105. *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*60.

106. 39 AM. JUR. 2d *Health* § 1 (2012). See, e.g., *Watson v. Maryland*, 218 U.S. 173 (1910) (“[T]he police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health.”); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (Thomas, J., dissenting) (“[T]he structure and limitations of federalism . . . allow the states great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (internal citations omitted).

107. *Armstrong v. State*, 989 P.2d 364, 380 (Mont. 1999).

108. See *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*62.

ents to determine the “care, custody, and control of their children.”<sup>109</sup> However, if the legislature retailored the law from medical regulations into a general ban on negative statements by parents about LGBT children, that law would come closer to interfering with parental upbringing. Such a blanket ban would be unconstitutional even if California justified the ban with a public policy identifying that “[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming,”<sup>110</sup> and that social stigma of LGBT people was harmful to public health because “[m]inors who experience family rejection based on their sexual orientation face especially serious health risks.”<sup>111</sup> The California legislature, however, interferes only minimally with protected parental rights because SB 1172 “bars parents only from seeking [SOCE] through state-licensed mental health professionals . . . [and] does not enact a comprehensive and total ban; parents still can seek SOCE or its equivalent through religious institutions or other unlicensed providers.”<sup>112</sup>

Importantly, California’s law stays within the realm of regulation, and does not impose criminal sanctions for any of the parties involved, including the therapist, the minor, or the minor’s parents.<sup>113</sup> As a result, the court concluded that the State is acting narrowly in the service of public health without interfering into more fundamental parental decisions, such as the acceptance or rejection of LGBT children. If the legislature were to extend its power beyond regulation of public health and into the realm of substantive and generalized parental decisions about rearing children, then it likely would be overstepping its existing authority into protected constitutional rights.

#### IV. SUBSTANTIVE DUE PROCESS CLAIMS: PRIVACY AND SEXUALITY: A POTENTIAL CLAIM FOR SOCE BAN OPPONENTS

Although the *Welch*, *King*, and *Pickup* plaintiffs cited substantive due process violations of parental rights, the plaintiffs conspicuously did not make claims based on substantive due process rights of privacy, reproduction, and sexuality. Notably, the Supreme Court has stated that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” holding that “the Constitution demands for the autonomy

---

109. See *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*62.

110. S. 1172 § 1(a), 2011-12 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865).

111. *Id.* § 1(m).

112. *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*65–66.

113. *Pickup*, 2012 U.S. Dist. LEXIS 172027, at \*65–66.

of the person in making these choices.”<sup>114</sup> Superficially at least, if the Constitution affords protection of “choices central to personal dignity and autonomy”<sup>115</sup> by way of sexual intimacy, then the Constitution may also protect choices related to attempts to change one’s sexual orientation. After all, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>116</sup> An expansive reading of such a broad-based liberty interest in defining one’s existence could include attempts to change one’s sexual orientation.

However, courts would likely rebuff attempts to attack SOCE bans on these sorts of theories for several reasons. First, the State retains police powers that allow it to protect individuals from harming themselves.<sup>117</sup> Second, such an interpretation misrepresents a key aspect of recent Fourteenth Amendment jurisprudence, namely the Court’s increasing concern with the dignity of LGBT people.<sup>118</sup> Third, and most importantly, because SOCE bans do not apply to adults, the State’s power to infringe on a minor’s privacy rights is significantly stronger.<sup>119</sup>

*Lawrence v. Texas* famously held that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>120</sup> However, the Court deliberately granted such a liberty to adults,<sup>121</sup> expressly noting that the “case does not involve minors.”<sup>122</sup> A broader notion of LGBT people is fundamental to this holding that certain intimate conduct is beyond the reach of the state: the notion that the State cannot take control of LGBT individuals’ destinies by making their intimate relations a crime.<sup>123</sup> Some might argue that SOCE bans attempt to subordinate certain LGBT people—those attempting to change their sexual

---

114. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

115. *Lawrence*, 539 U.S. at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

116. *Casey*, 505 U.S. at 851.

117. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring) (discussing the common law’s historic bar on suicide).

118. Such concern stems from a reading of the Due Process and Equal Protection clauses together. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. 558; *United States v. Windsor*, 133 S. Ct. 2675 (2013).

119. See *supra* Part II.C. Individuals who pursue SOCE may not see the therapy as self-harm, but rather as alleviating suffering. However, adults have more advanced emotional and legal decision-making abilities, and states that bar SOCE for minors perceive the therapy as posing too great of a risk to minors’ mental health.

120. *Lawrence*, 539 U.S. at 567.

121. *Lawrence*, 539 U.S. at 567.

122. *Lawrence*, 539 U.S. at 578.

123. See *Lawrence*, 539 U.S. at 578.

orientation or gender identity. But in fact, the LGBT movement has heralded SOCE bans as “protect[ing] LGBT youth from so-called therapists who use dangerous and discredited practices.”<sup>124</sup> Further, the bans notably do not bar adult LGBT individuals who choose to engage in SOCE, and only protect the most at-risk LGBT people: minors.

Opponents of SOCE bans also may argue that the bills subordinate “ex-gays,” noting that “every day brings new hostile acts against the ex-gay community under the justification of fighting ‘hate’ against homosexuals.”<sup>125</sup> However, claims that “[giving] sexual orientation protection to one group while excluding another is discriminatory”<sup>126</sup> would have difficulty gaining traction considering that sexual orientation is not (yet) a protected class, and SOCE bans are facially neutral. Further, the social science community has achieved consensus that SOCE do not actually change one’s sexual orientation.<sup>127</sup> As a result, judicial scrutiny would hinge on recognition that attempting to change one’s sexual orientation is a fundamental right “implicit in the concept of ordered liberty.”<sup>128</sup> SOCE ban opponents would have to argue that the Fourteenth Amendment protects a right to attempt to change one’s underlying sexual desires.

However, the State has more leeway in the minor context for regulating rights that originate in the Due Process Clause. For example, the Supreme Court has announced that states “unquestionably” may require parental involvement when a minor considers an abortion because of the states’ compelling interest in the welfare of minors.<sup>129</sup> Although the parental notification requirements in abortion legislation presume adverse desires between the girl and her parents, the State may intervene to protect a minor even when that intervention goes against the wishes of the parent.<sup>130</sup> Applying this logic to SOCE, the State would have the power to ban procedures for minors, even if the parents strongly support the therapy for their minor child.

---

124. Andy Towle, *Bills Introduced to Ban ‘Ex-Gay’ Therapy for Minors in New York*, TOWLEROAD (Jan. 14, 2014, 10:25 AM), <http://www.towleroad.com/2014/01/bills-introduced-to-ban-ex-gay-therapy-for-minors-in-new-york.html>.

125. Media Advisory, Parents and Friends of Ex-Gays & Gays, Ex-Gay Legislation Introduced in Hate Crimes Bill (Apr. 11, 2005), *available at* <http://www.freerepublic.com/focus/f-news/1382382/posts>.

126. *Id.*

127. Brief for the American Psychological Association et al. as Amicus Curiae on the Merits in Support of Affirmance at 9–10, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2012) (No. 12–144).

128. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

129. *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 326 (2006).

130. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 946–47 (1992).

V. PROJECTING FORWARD: WHAT DO SOCE BANS MEAN  
FOR THE LGBT MOVEMENT?

LGBT advocates have strongly supported SOCE bans not only because they protect LGBT youth from “harmful psychological abuse and so-called reparative ‘therapy,’”<sup>131</sup> but also for preventing “shame about an immutable characteristic of their nature.”<sup>132</sup> Thus, the work SOCE bans do is two-fold: (1) protecting the most vulnerable members of the LGBT community (namely, adolescents with particularly unsupportive parents) from direct harm; and (2) pushing a wider de-stigmatization campaign, whereby prejudice is isolated as irrational, and social inclusion of LGBT people becomes mainstream. In that sense, the law changes the conversation from one of permissible differences of opinion to a matter of technocratic regulation by the state aimed at preventing social harms. More specifically, within the existing constitutional context, advocacy against SOCE bans does major work in establishing a core premise of LGBT legal reform: establishing LGBT identity as an immutable and fundamental part of a person’s identity.<sup>133</sup>

The LGBT movement has not always had such a central focus on public identity as a basis for legal reasoning. Early LGBT advocacy focused on sexual privacy, grounded in notions that “[the past fifty years] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>134</sup> This privacy-based argument reflected the idea that sexual *intimacy* was at the core of the expression of one’s humanity, rather than sexual *identity*. In these early days of the movement, when so few straight people knew openly LGBT people, sexual intimacy (generally defined) was often the only common ground that could be established to recognize the humanity of LGBT people. This had advantages as well as disadvantages; although sexual intimacy is a near-universal experience, it is not generally a topic for polite society. This public stigma became particularly evident during the HIV/AIDS crisis of the 1980s – 1990s, which forced tens of thousands of men

---

131. Press Release, Equal. Cal., Sen. Ted Lieu, Author of Bill Banning Conversion “Therapy” in CA, to Receive Ally Leadership Award at Los Angeles Equality Awards (Sept. 20, 2013), *available at* <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=8492711&ct=13313829>.

132. Press Release, Garden State Equal., Federal Court to Hear Summary Judgment Motion on New Jersey Conversion Therapy Ban (Oct. 2, 2013), *available at* <http://www.gardenstateequality.org/2013/10/federal-court-to-hear-summary-judgment-motion-on-new-jersey-conversion-therapy-ban/>.

133. *See, e.g.*, Andrew Sullivan, *The Scalia-Walker Convergence*, DISH (Aug. 4, 2010, 6:40 PM), <http://dish.andrewsullivan.com/2010/08/04/the-scaliawalker-convergence/>.

134. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

out of the closet,<sup>135</sup> and which stirred conversations of mortality and sexually transmitted diseases, topics that most people preferred not to discuss in public.<sup>136</sup>

Contemporary LGBT advocates, in contrast, have moved away from framing sexual freedom around sexual expression and intimacy. Rather, they have instead created a model seeking identity-based civil and social recognition. In this model, the project moves away from the freedom *per se* to transgress sexual or general norms, and towards a model where LGBT people *already* exist in a sort of state of nature, and seek civic and social recognition based on this identity.<sup>137</sup> This contemporary model highlights LGBT identity as simply a variation within nature and seeks equality based on that identity, rather than liberating LGBT people from systems of power and identity that are mystified as ‘natural’ to begin with.<sup>138</sup> The goal of the movement shifts into constructing a legal identity as something permanent and ‘true,’ rather than questioning legal categories of gender and sexuality as inherently problematic or oppressive as a starting point. This shift has not only occurred in the wider LGBT cultural movement, but it has been observed in the wider constitutionalization of the LGBT movement as well.<sup>139</sup> This shift towards constitutional law thus plays a direct role in “privileg[ing] more moderate movement factions, tactics, and goals over more radical

135. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 39 (2013).

136. For an account of the various tactics used by AIDS activists to overcome these barriers, see *HOW TO SURVIVE A PLAGUE* (Production Square Films 2012). See also LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION 176–85* (2012).

137. *Compare* CAST OF THE ROCKY HORROR PICTURE SHOW, *SWEET TRANSVESTITE* (Ode Records 1975) (“Don’t get strung out/ By the way I look,/ Don’t judge a book by its cover/ I’m not much of a man by the light of day,/ but by night I’m one hell of a lover”), with ARCADE FIRE, *WE EXIST* (Merge Records 2013) (“They walk in the room/ And stare right through you/ Talking like/ We don’t exist/ But we exist”). The first song, from the musical *Rocky Horror Picture Show*, expresses the pride that Dr. Frank-N-Furter feels when he transgresses social norms in gender presentation, and when he engages in sexual conduct with another man. The second song, inspired by recent anti-LGBT violence in Jamaica, is a fictional story of a teenage son ‘coming out’ to his father. It expresses the notion that staying in the closet will not stop the son from being gay, but rather would cause him to feel as if his real self is invisible.

138. Such a deconstructionist approach is often adopted by queer theorists. See, e.g., JUDITH BUTLER, *UNDOING GENDER* 212 (2004) (“My effort was to combat forms of essentialism which claimed that gender is a truth that is somehow there, interior to the body, as a core of as an internal essence, something that we cannot deny, something which, natural or not, is treated as given.”).

139. See, e.g., *Lawrence*, 539 U.S. 558.

ones,”<sup>140</sup> leading to less of a traditional leftist critique, of gender as an inherently oppressive system, and more of a typically liberal request for “equality of political rights, which is the first mark of American citizenship.”<sup>141</sup> Consequently, this frame of protecting minors from harmful therapy superficially unites moderate (equality-based) and more radical (liberationist) elements, but papers over much of the framing struggle within the movement itself about what the very goals of the LGBT movement are. More specifically, the law does not answer the question of whether SOCE is bad because it shames minors for experiencing sexual feelings, which more radical elements see as inherently problematic, or because it creates a status of inferiority on the basis of *being* LGBT. Even if the law prefers an equality norm to a liberationist one, the law certainly does work on both fronts.

#### A. “Disgust” to “Dignity”

Within this legalist framework of LGBT identity, prominent political theorist Martha Nussbaum has observed a shift in wider political discourse of LGBT identity from a notion of ‘disgust’ to a ‘politics of humanity.’<sup>142</sup> Disgust, commonly associated with ‘dirty’ objects, often includes revulsion to bodily fluids, including blood, fecal material, and sexual fluids. Unsurprisingly, Nussbaum observes the politics of disgust were particularly prominent in the context of the LGBT movement during the 1970s sexual revolution and the height of HIV/AIDS activism of the 1980s and early 1990s, during which advocates framed their goals as ones of sexual freedom and wellness.<sup>143</sup> The politics of disgust “has a dual goal: to inspire simple revulsion and loathing for gay [and bisexual] men, and to link their practices to disease and danger,”<sup>144</sup> which “help to justify laws that disadvantage that group.”<sup>145</sup> Although the disgust principle is generally facially unacceptable as a basis for lawmaking,<sup>146</sup> it becomes present even at the highest level

140. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 895 (2013) [hereinafter NeJaime, *Constitutional Change, Courts, and Social Movements*] (citing Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74–76 (2011)).

141. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (1991).

142. I adopt the terminology of “disgust” and “politics of humanity” from Martha Nussbaum’s book *FROM DISGUST TO HUMANITY* (2010). I adopt the term “dignity” from Justice Kennedy’s famous descriptions of constitutional protections. *See, e.g., Lawrence*, 539 U.S. at 567; *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

143. *See* NUSSBAUM, *supra* note 142, at 180–81.

144. *Id.* at 5.

145. *Id.* at 8.

146. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[T]he amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rela-

of constitutional lawmaking, as seen in *Bowers v. Hardwick*: “Condemnation of those practices [same-sex sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards . . . This is essentially not a question of personal ‘preferences’ but rather of the legislative authority of the State.”<sup>147</sup> Earlier generations of LGBT legal activists disagreed strongly with the conclusion that the State has a legitimate interest in privileging some preferences over others, even if the court largely adopts their frame of sexual rights located in constitutional notions of privacy.

Nussbaum notes that what she terms the ‘politics of disgust’ as expressed in *Bowers* was replaced by ‘the politics of respect’ in *Lawrence v. Texas*, which overruled *Bowers*: “When sexuality finds overt expression in intimate conduct with another person, the conduct is but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>148</sup> Although couched in language of ‘sexual choices,’ Justice Kennedy’s opinion in *Lawrence* discusses sexuality not in language of disgust or immorality, but rather in terms of a close personal relationship between two people. This shifts the conceptual framework from discussing sexual preferences towards something more fundamental: human dignity. This shift reflects that the idea of the government recognizing already-existing relationships has a substantially different legal meaning than pure sexual freedom. Advocacy on behalf of SOCE bans reflects a similar, *Lawrence*-esque analysis; there are LGBT people who already exist and have legal rights, rather than a vision in which all people exist (regardless of social identity) and make a wide variety of differing sexual decisions, and it is puritanical to privilege some over the other.

In a broader sense, SOCE bans are not only humanist attempts to protect vulnerable members of society from harm, but rather are larger attempts at safeguarding the *dignity* of the LGBT people as a whole. Dignity is a concept often referenced in LGBT constitutional law. It has its roots in the Civil Rights movement, which used political discourse as a tool to humanize and restore dignity to marginalized populations. As President Johnson remarked in supporting the 1964 Civil Rights Act, “We cannot deny to a group of our own people the essential elements of human dignity which a majority of our citizens claim for ourselves.”<sup>149</sup> This dignity is not merely a

---

tionship to legitimate state interests”). Although it is unclear if animus per se is disqualifying, or merely a legal nullity, animus regardless fails the rational basis test.

147. *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring), *overruled by Lawrence*, 539 U.S. at 578.

148. *Lawrence*, 539 U.S. at 567.

149. Bruce Ackerman, *Dignity is a Constitutional Principle*, N.Y. TIMES (Mar. 29, 2014), [http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?\\_r=0](http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?_r=0).

permissible legislative motive, but also cuts to the core of the principle of constitutional equality. Famously, *Brown v. Board* used extensive social science data showing that the humiliation that African-American schoolchildren experienced in attending segregated schools had not only a social science dimension, but also a constitutional one, because it created “a feeling of inferiority as to their [the children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone,”<sup>150</sup> which creates “a deprivation of the equal protection of the laws.”<sup>151</sup> The LGBT movement has continually drawn on this constitutional tradition to protect against the deprivation of dignity,<sup>152</sup> such as that which occurs through SOCE.

SOCE imply that LGBT status is pathological, which has tremendously harmful effects on LGBT youth writ large, not just those experiencing SOCE. This notion of LGBT ‘sickness’ includes notions of inferiority, low self-esteem, and alienation,<sup>153</sup> and falls in line with historical trends of what Nussbaum identifies as “disgust-based subordination.”<sup>154</sup> Certainly, if the government performed SOCE on LGBT youth, that practice would run afoul of constitutional principles. However, under current SOCE bans, the state is exercising proactive powers to protect vulnerable members of society, as well as endorsing a politics of equal respect. This re-framing allows us to rethink “legal treatments of sexual orientation, just as this fundamental value [of equal respect] earlier entailed a rethinking of issues of religion, race, and gender.”<sup>155</sup> As a result, banning SOCE accomplishes a key political goal of shifting the political framework away from ‘LGBT deviation’ from the ‘heterosexual norm’ into a baseline norm that includes a wide diversity of sexual and gender identities.<sup>156</sup> Such a legislative action is consistent with the larger goal of anti-subordination and a politics of equal respect, which already exist within the American legal framework. This shift is not only a framing one, but also strategic, requiring compliance with ex-

---

150. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954).

151. *Brown*, 347 U.S. at 494.

152. See, e.g., Craig J. Konnoth, Note, *Created in its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 322 (2009) (“Ultimately, gay rights as we understand them today would make very little sense without a fundamental reliance on concepts and arguments formed through reliance on the racial justice movement.”).

153. See generally APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, *supra* note 6.

154. NUSSBAUM, *supra* note 142, at 22.

155. *Id.* at 35.

156. See, e.g., EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 92 (1990) (“There is a *homosexual* in this text [*Billy Budd*]— a homosexual person, presented as different in his essential nature from the normal men around him.”).

isting legal principles rather than a more fundamental constitutional change.<sup>157</sup>

Notably, SOCE bans regulate conduct among private actors, touching on personal decisions about one's self-acceptance. As a result, substantive due process could do additional work for SOCE ban opponents, because decisions about sexual identity are intensely connected with wider notions of one's role within the universe. Such a vision embraces stricter individualized conceptions of liberty whereby one should generally be able to do what one desires, so long as there is no harm to anyone else. However, American constitutional law on privacy notably does not embrace such a strict libertarian vision, and adopts a dignity-central approach.<sup>158</sup> Thus, although *Griswold* famously discusses "penumbras" of privacy, the liberty interests protected by the Fourteenth Amendment are not fully separated into due process and equal protection zones. The home is not "a kind of government-free zone"<sup>159</sup> where all choices are allowed. Rather, the decisional liberty protected by due process combines with non-subordination principles (including dignity) and the state's police power to create a larger governmental interest.

Although states may infringe on privacy rights in the context of SOCE bans, such minor intrusions on privacy are justified to protect minors from harm in the specific context and to protect against the subordination of LGBT people in the wider context. Courts have generally reasoned that they "need not decide whether SOCE actually causes 'serious harms'; it is enough that it could be 'reasonably be conceived to be true by the governmental decisionmaker,'"<sup>160</sup> but one can speculate that were sexual orientation or gender identity not immutable, the case for a minor's decisional liberty would be much stronger.

Consequently, although the courts do not have a case in which the State itself is impermissibly enforcing stigma, the SOCE ban cases are an important landmark in the judiciary's general rejection of the stigmatization of LGBT people. Such a bar on state-sanctioned stigma is not, of course, found in the text of the Fourteenth Amendment. However, this reading of the Fourteenth Amendment is largely guided by notions that impermissible identity-based stigma "is designed to prevent both irrational and unfair in-

---

157. See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011).

158. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) ("the Constitution's elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity.").

159. NUSSBAUM, *supra* note 142, at 75–76.

160. *Pickup v. Brown*, 728 F.3d 1042, 1057 (9th Cir. 2013) (internal citations omitted).

fliction of injury.”<sup>161</sup> The Court has identified this fairness principle most notably in the context of the cases challenging discriminatory laws against illegitimate children, where the Court recognized that “[i]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>162</sup> The Supreme Court has accordingly disfavored laws based on the irrational view that families containing illegitimate children are somehow less worthy in the eyes of the government.<sup>163</sup> As a result, “[W]hat is really at issue is not the immutability as such, but irrelevance to the purpose at hand.”<sup>164</sup> States like California and New Jersey have found that SOCE reflects a similarly irrational affront to dignity: these efforts are overwhelmingly unsuccessful, and serve the sole purpose of stigmatizing at-risk youth.

The SOCE bans create space for an emerging recognition of the “dignity as free persons” that all individuals enjoy.<sup>165</sup> Such dignity is not merely confined to one’s home, where sexual intimacy is expressed, but also has a public aspect, namely social status. For example, the Defense of Marriage Act, which barred federal recognition of valid same-sex marriage, took away “a dignity and status of immense import,” that resulted in “injury and indignity” which violated an “essential liberty protected by the Fifth Amendment.”<sup>166</sup> Notably, this liberty interest is not only present in the private aspect of marriage; DOMA “undermines both the public and private significance of state-sanctioned same-sex marriages.”<sup>167</sup> SOCE bans resonate with this constitutional conception of dignity not only because they protect the innermost vulnerability of a person’s mind, but also because they affirm the equal dignity of LGBT individuals.

### B. SOCE Bans as an Organizational Tool

The campaign for SOCE bans allows the LGBT movement to accomplish a public relations goal as well. By highlighting the stories of the struggles of some of the most vulnerable LGBT populations, the bans draw attention to the broader ideological goals by way of specific grievances, al-

---

161. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976).

162. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

163. *See New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Reed v. Campbell*, 476 U.S. 852, 854–55 (1986).

164. NUSSBAUM, *supra* note 142, at 119.

165. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

166. *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013).

167. *Windsor*, 133 S. Ct. at 2694.

lowing advocates to make demands.<sup>168</sup> This accomplishes the goal of putting legislators, and the public, in someone else's shoes. By enabling people "to imagine what gays and lesbians are pursuing, and see it as relevantly similar to their own search for personal and sexual integrity and expression," the LGBT movement lays the groundwork to achieve a 'politics of humanity.'<sup>169</sup> Achieving this politics of humanity syncs with a broader constitutional purpose of equal protection, namely non-subordination. After all, the categorization of people often "embod[ies] a legacy of hierarchy and therefore cannot be permitted to stand."<sup>170</sup> Moreover, publicly highlighting the grievances of vulnerable LGBT people serves two other interconnected goals: mobilizing constituents to support LGBT advocates' cause and defining substantive goals of the movement.

SOCE bans reflect a larger reality of the LGBT movement, namely its multidimensional approach to social reform. In contrast to the traditional scholarly focus on marriage equality litigation, LGBT advocacy has been multidimensional, moving the ball forward on whatever field is most receptive. Although litigation has been critical to securing key victories, lawyer-activists generally recognize that litigation is only one part of a larger strategy in accomplishing the movement's goals.<sup>171</sup> Particularly in the American system, where power is dispersed among different branches and levels of government, LGBT lawyer-activists have seized on a multidimensional approach that appreciates this disjointed structure.<sup>172</sup> Although marriage litigation has been an enormously helpful tool in bringing awareness to the LGBT movement, few movement leaders perceive it as being an indispensable demand of the LGBT movement. For example, Evan Wolfson, a leader of the marriage equality movement, observes that "[w]hat we needed and called for and built was an affirmative and sustained campaign that reflected what I described repeatedly as the four multi's: multi-year, multi-state, multi-partner, and multi-methodology" in order to accomplish a wider goal of LGBT equality.<sup>173</sup>

#### CONCLUSION

Federal courts have largely approved efforts to ban SOCE for minors, finding that the bans have been tailored carefully to prevent incursions into

---

168. NeJaime, *Constitutional Change, Courts, and Social Movements*, *supra* note 140, at 892.

169. NUSSBAUM, *supra* note 142, at 48.

170. *Id.* at 45.

171. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2011).

172. *Id.* at 989.

173. Evan Wolfson, *Where Perry Fits in the National Strategy to Win the Freedom to Marry*, 37 N.Y.U. REV. L. & SOC. CHANGE 123, 125 (2013).

protected constitutional rights. Although the legislation approaches existing constitutional limitations on First and Fourteenth Amendment rights, the careful molding of public health regulations to the articulated purposes of protecting LGBT minors accomplishes the public policy goal entirely with permissible governmental powers. Further, LGBT advocates have pursued SOCE bans as part of a larger campaign of destigmatization, attacking the pathologization of LGBT identity as a proxy for wider social acceptance of LGBT people. By doing so, LGBT advocates have reframed the discussion of LGBT issues from a discussion of sexual practices to one of political identity and dignity, leading to greater success within existing constitutional doctrine. ✪